U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 14 December 2006

BALCA Case No.: 2005-INA-202
ETA Case No.: P2004-NY-02511796

In the Matter of:

GARNERVILLE HOME,
Employer

on behalf of

NANCY VERGERE,
Alien.

Certifying Officer: Dolores DeHaan[1]
New York, New York

Appearance: Steven Elias, Esquire
New York, New York
For the Employer and the Alien

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of

[1] Ms. DeHaan was the Certifying Officer who denied the application. The Employment and Training Administration subsequently transferred responsibility over applications filed in New York prior to the effective date of the "PERM" regulations to its Philadelphia Backlog Processing Center.

the Code of Federal Regulations ("C.F.R.").[2] We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

The Employer, Garnerville Home, is an assisted living facility. On April 6, 2001, it filed an application for alien employment certification on behalf of the Alien, Nancy Vergere, to fill the position of Personal Care Aide. (AF 55-56). The job to be performed was described as follows:

> Assist resident with personal care & hygiene. Supervise residents with medication administration. Assist resident with meals & ambulation as needed. Weigh residents. Housekeeping duties.

Minimum requirements for the position were listed as three months of experience in the job offered or in the alternative occupation of Nurse Aide.

The Employer received one applicant referral in response to its recruitment efforts, who the Employer reported was rejected for inconsistencies in her statements regarding her work experience. (AF 37-43).

A Notice of Findings (NOF) was issued by the CO on April 26, 2005, proposing to deny labor certification for failure to document lawful rejection of a U.S. worker. (AF 30-32). The CO found that the Employer's rejection of qualified and available U.S. worker Stewart on the basis of "inconsistent statements" was not based on lawful grounds. Noting the applicant's over eight years experience as a Home Health Aide, Residential Care Counselor and Supervisor, and the Employer's assertion that he had tried unsuccessfully to contact the applicant for verification, the CO instructed the

[2] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

Employer to document these subsequent attempts with copies of correspondence, phone logs, certified mail receipts and return receipts. The CO also noted that the Employer's job application contained questions that are neither lawful, nor job-related. The questions included inquiries into height, weight, birth date and marital status.

In Rebuttal, the Employer stated that the applicant was interviewed but rightfully rejected due to inconsistencies in the employment history among the applicant's job application, references and resume. (AF 22-29). The Employer stated that it had tried to verify the applicant's employment history on three occasions but was told the applicant was on vacation. The Employer stated that it was unable to provide documentation because "our phone company has not been able to provide us with (sic) phone log."

A Final Determination denying labor certification was issued by the CO on June 22, 2005, based upon a finding that the Employer had failed to document lawful rejection of U.S. worker applicant Stewart. (AF 20-21). The CO concluded that although the Employer had pointed out inconsistencies in the applicant's application package, the Employer had not documented a good faith effort to follow-up with the applicant and/or any of the applicant's former employers. The CO noted that several reasonable explanations could explain these "inconsistencies," yet the Employer chose to reject the applicant despite the fact her qualifications clearly exceed the Employer's basic minimum requirements. On this basis, the CO concluded that the Employer had unlawfully rejected an able, willing, qualified and available U.S. worker in favor of the Alien.

The Employer filed a Request for Review by letter dated July 26, 2005, and the matter was referred to this Office and docketed on August 26, 2005. (AF 1-19).

DISCUSSION

Federal regulations at 20 C.F.R. § 656.21(b)(6) require an employer applying for permanent labor certification to document that any U.S. applicants for the position were

rejected solely for lawful, job-related reasons. The regulations at 20 C.F.R. § 24(b)(2)(ii), further state in part, that the Certifying Officer shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally acceptable manner, the duties involved in the occupation as customarily performed by other workers similarly employed.

An employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.,* 1987-INA-161 (Dec. 7, 1988)(*en banc*). In order to document lawful rejection of a U.S. worker, an employer must demonstrate that the applicant was not qualified, not interested and/or not available for the job.

In the instant case, the U.S applicant had in excess of eight years of qualifying experience for a job that required three months of experience. The Employer rejected that applicant as "unreliable" due to inconsistencies in her employment application. Specifically, the applicant's resume listed her most recent job as taking place at Golden Acres Home for Adults from 2002 to 2004, whereas the application she completed at the time of interview showed her latest employer as U.C.P. of Westchester from September 2003 to the present. As further basis for rejection, the Employer cited a reference letter from Newark Community Health Centers, Inc. stating that the applicant worked there from January 2002 until May 28 2004, while this employer was not mentioned in either the applicant's resume or her application.

We observe that the U.S. applicant provided extensive information regarding her employment history, including references, names and telephone numbers for five of her former employers. The Employer made no effort whatsoever to contact any of these sources. As was noted by the CO, several reasonable explanations can explain these "inconsistencies," including that the applicant may have held several part-time jobs simultaneously, her resume may not have been up-to-date as submitted, and the applicant

may not have wanted to show an employer on a resume submitted to an anonymously-listed advertisement.

The Employer alleges "we attempted to contact her to verify her employment history on three separate occasions without success as we were told that she was on vacation." (AF 37). The Employer made no effort to document these attempts, despite the CO's specific request for such documentation. The Board in *M.N. Auto Electric Corp.,* 2000-INA-165 (Aug. 8, 2001)(*en banc*), *citing Gencorp,* 1987-INA-659 (Jan. 13, 1988)(*en banc*), noted that although a written assertion constitutes documentation that must be considered, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. To document initial or follow-up telephone conversations, the Board in *M.N. Auto Electric, supra,* instructed:

> An employer must, at a minimum, keep reasonably detailed notes on the conversation (e.g., when the call was made, how long it lasted, whether there was a successful contact with the applicant, the substance of the conversation. Pre-prepared checklists may be helpful in documenting what was discussed with the applicants). Where available, phone records showing the time and duration of the phone contacts should be submitted by Employer.[14] *M.N. Auto Electric Corp., at* 12.

Footnote 14 further states:

> The record in the cases before the Board suggeststhat the CO believes that records of local phone calls are available upon request from the telephone company. This may or not be true, *compare Edelweiss,* 2000-INA-231 (Sept. 21, 2000)(Employer produced a flier from the phone company establishing that local calls could not be itemized). An employer should, however, at the least be prepared to document that it asked the phone company for such records in a timely fashion. *Id.*

In the instant case, the CO requested specific documentation of contact and the Employer chose to disregard the CO's instructions. The Employer took a minimalist approach in documenting its recruitment efforts. While the Employer, in its Request for Review, submitted copies of phone bills in an effort to document contact, rebuttal evidence first submitted with the Request for Review, after the issuance of the Final

Determination, is not part of the record and cannot be considered on appeal pursuant to 20 C.F.R. § 656.27(c), *Atlantic Sales, Inc.,* 1988-INA-349 (Aug. 22, 1989)(*en banc den recon*). Moreover, we note that the phone bills submitted only document one effort at contact. While the Employer has highlighted two numbers on the bill, one does not match the applicant's number (it is off by one digit). (AF 17, 18). Inasmuch as the Employer failed to document lawful rejection of this apparently well qualified U.S. worker, we conclude that labor certification was properly denied. The Employer has not met its burden to show that U.S. workers are not able, willing, qualified or available for this job opportunity.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the Panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five

double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.